

Françoise Tulkens on Human Rights' Restrictions

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Françoise Tulkens is about to leave the European Court of Human Rights, and this is sad news. For the Court, of course, but also for the academic community. Throughout her career as a judge, Françoise Tulkens has always remained an academic at heart. Whether in her inspirational conferences and publications, on the one hand, or in her rigorous judgements and opinions, on the other, she has constantly encouraged and nourished what she regarded as a much needed dialogue, and at times “mutual check” to borrow her own words, between judges and academics.

In this tribute to her work, I would like to focus on one aspect of her many unique contributions to European human rights law and one that only she could make *qua* both a judge *and* an academic: her careful treatment of the vexed question of the restrictions to human rights. Over the course of many of her academic writings, but also of her judgements and opinions, Françoise Tulkens has developed a distinct and illuminating account of how ECHR rights may be restricted when they conflict with other moral considerations including the general interest and other ECHR rights (the “conflict of rights” issue) and in case of individual renunciation to ECHR rights (the “abuse of rights” issue). I will address those two issues in turn as I think that some of the limitations inherent to Françoise Tulkens’ proposal as to how to address conflicts of human rights appear clearly in her treatment of individual renunciations to human rights.

But, first, a few general considerations about human rights’ restrictions are in order. Human rights duties are rarely said to be absolute and even when they are, evidence of their absolute enforcement is hard to find –exceptions to their scope are often defined *ex post* (e.g. the judgement in [Gäfgen v. Germany](#), to which Françoise Tulkens partly dissented), for instance, or pragmatic compromises are made in the specific case. It is still a puzzle, however, for human rights theorists reluctant to abandon

the Kantian framework to explain how human rights may at the same time be said to “trump” or, at least, “shield from” other moral considerations (e.g. other individual or public interests) and hence be regarded as distinct from them in moral quality and stringency, on the one hand, while, at the same time, being weighed and balanced and then subjected to justified restrictions based on those moral considerations under certain circumstances, on the other. Importantly, this is not a minor concern that arises on the output side of human rights practice and hence of human rights theorizing. One’s take on the topic has wide implications all the way down in any account of the nature of human rights and of their foundations –settling in for an interest-based account of human rights, for instance, is sometimes (wrongly) accused of leading to the endorsement of a balancing approach in case of conflict and hence of necessarily condoning a utilitarian approach to human rights.

One of the difficulties that stalls the debate, I think, is the focus on the claim or right-side of a human rights conflict instead of the supply or duty-side of the conflict. When human rights conflict in a specific case, it is in fact always a conflict of human rights duties. And this has to affect, as a result, our theoretical understanding of what moral entities are in opposition and our normative proposal as to how to solve those conflicts. Understanding conflicts of human rights as conflicts of duties justifies, for instance, why we should not go back to the objective interests underlying human rights when approaching conflicts between the concrete and equal human rights duties of our institutions, nor attempt to weigh and balance them quantitatively the way we would balance mere individual interests. With respect to the procedure applicable to resolve conflicts of human rights through the non-quantitative conciliation of equal albeit conflicting duties, the egalitarian dimension of human rights requires an inclusive and democratic procedure. All this also has implications for the way in which conflicts between human rights duties and other conflicting moral considerations are resolved.

With respect to the “conflict of human rights” issue, first, Françoise Tulkens’ general take is exposed in the seminal piece she published on the topic with Olivier de Schutter (De Schutter, O. and Tulkens, F., ‘Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution’, in Brems, E.

(ed.), *Conflicts between Fundamental Rights*, Antwerp: Intersentia 2008, 169-216). That article provides one of the very few discussions of the question of conflict of ECHR rights that is both theoretically informed and practically focused. In that piece, Françoise Tulkens and her co-author criticize the ECtHR's balancing method and its focus on the necessity test, and propose to complement it with a richer and more principled deliberative and democratic procedural approach to resolve conflicts of human rights. While I support much of their procedural proposal, I think it fails to take the supply-side of human rights and the duty-side of human rights conflicts seriously enough and, as a result, to escape the interest-focused and balancing approach of the Court. Accordingly, it cannot pay sufficient attention to the egalitarian, relational and hence collective dimension of human rights and the equal rank of all human rights duties. Of course, this concern for equality may indirectly explain Françoise Tulkens' and her co-author's focus on democratic deliberation in resolving human rights conflicts. However, the connection to equality is more direct and foundational to human rights than they are ready to acknowledge. Broaching it openly implies relinquishing some liberal assumptions pertaining to human rights' individualism that are not so easily acknowledged and abandoned.

This inherent liberal limitation in the ECtHR's human rights reasoning brings me to my second focus in the legacy of Françoise Tulkens: the individual renunciation to human rights and the "abuse of human rights" issue. The abuse of rights under Article 17 ECHR is the second ground for human rights' restrictions foreseen by the Convention (besides the public interest and other human rights) and one Françoise Tulkens has always been very critical of. In short, her main criticism is that Article 17 does not allow for the balancing of interests she recommends when restricting human rights: it is too abstract and unilateral, and an all or nothing mechanism. What I fail to understand, however, is how at the same time Françoise Tulkens can be that open about the justifying role of individual consent in areas protected by the human right to private life of others (e.g. her endorsement of the unanimous judgement in *K.A. and A.D. v. Belgium*, § 85) or by one's own human rights (e.g. her dissenting opinion in *Leyla Sahin v. Turkey*, § 11-12). There, it seems that individually renouncing one's own

human rights may be protected as an application of the human right to personal autonomy at any rate. But the same danger observed in relation to Article 17 seems to be looming large, however: if the invocation of individual consent by the State were enough to justify a restriction to human rights, there would be no check on one's right to have equal rights and hence no protection of one's equality. One needs to be more cautious about the possibility for human rights-holders to renounce their equal rights by individual fiat and hence their respective equality. This comes very close to another dangerous practice in the Court's case-law: the invocation by the State of the dignity of the human right-holders among the justifications for a restriction of the very human rights they invoke before the Court (e.g. the judgement in *SH and Others v. Austria*, in which Françoise Tulkens actually dissented). That practice is reminiscent of the dangers of double counting of moral preferences criticized by Ronald Dworkin in the utilitarian approach to human rights' restrictions (the so-called "Sarah-lovers" critique).

In conclusion, there is no escaping from the complex question of the restriction to human rights if one is either to make sense of the nature and justification of human rights as an academic or to devise a coherent and justified case-law as a judge. Although one may disagree with some of her views, Françoise Tulkens identified early on how seriously to take human rights' restrictions and how central the issue is to understanding and hence respecting human rights in the first place. Thank you, Françoise, for building bridges between our scientific concerns and the Court's practice in this respect. It is our responsibility now to tend your legacy and to consolidate those bridges through mutual information, dialogue and critique.